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Judicial Deference to Administrative Construction of Washington's Law Against Discrimination: *Griffin v Eller* and *Marquis v. City of Spokane*

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JUDICIAL DEFERENCE TO ADMINISTRATIVE CONSTRUCTION OF WASHINGTON'S LAW AGAINST DISCRIMINATION: *GRIFFIN V. ELLER* AND *MARQUIS V. CITY OF SPOKANE*

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Abstract: Washington's Law Against Discrimination is a broad remedial statute, granting both a general civil right to be free from discrimination and prohibiting certain specific "unfair practices." Although no person may be prevented from bringing a cause of action to enforce his or her civil rights, the remedies available for unfair practices are more limited. The Washington State Human Rights Commission ("Commission") recognized this statutory distinction, interpreting the Law Against Discrimination ("Act") to grant independent contractors the right to bring a cause of action for violations of their civil rights and to confine the statute's small employer exemption to its own administrative jurisdiction. Generally, Washington courts accord substantial deference to the Commission's statutory constructions. However, in *Griffin v. Eller*, the Washington Supreme Court inexplicably ignored established rules of judicial deference and invalidated the Commission's interpretation of the small employer exemption, thus preventing all persons who work for small employers from enforcing their civil rights. In contrast, the court in *Marquis v. City of Spokane* carefully followed these rules in correctly deferring to the Commission's interpretation granting independent contractors the right to sue. This Note criticizes the *Griffin* decision both for compromising the authority of a necessary and vital administrative agency and for frustrating the purpose of the statute. Moreover, this Note argues that courts should defer to the Human Rights Commission's construction of the Act when that construction is reasonably consistent with legislative intent and is necessary for furthering the purposes of the statute.

Washington's Law Against Discrimination[1] ("Act") is a broad remedial statute enacted for the purpose of eliminating and preventing discrimination in various prescribed areas against certain protected groups of Washington inhabitants. It grants both a general civil right to be free from such discrimination enforceable through private causes of action and proscribes a number of discriminatory "unfair practices" subject to both private civil and administrative remedies. In addition, the Act created the Washington State Human Rights Commission ("Commission") with broad rule-making and policy-formulation powers. Washington courts in general give great weight to the Commission's interpretations of the Law Against Discrimination when those interpretations are found to further the policies and purposes of the Act and to be reasonably consistent with the intent of the Legislature. Such deference is due primarily to the Commission's broad powers and authority and its expertise and experience in administering the Act.

1. Wash. Rev. Code ch. 49.60 (1996).

A recent Washington Supreme Court decision, however, has brought into question this practice of judicial deference to the Human Rights Commission's constructions of the Law Against Discrimination. In *Griffin v. Eller*[2] the court inexplicably ignored established rules of judicial deference in refusing to give any deference to the Commission, which had correctly interpreted the Act's definition of employer to exempt those employers with fewer than eight employees from only the jurisdiction of the Commission. The *Griffin* court instead misinterpreted the Act to exempt these employers from all statutory remedies. In so ruling, the court not only compromised the authority of a vital and necessary administrative agency but also wrongly interpreted the Act in a manner wholly contrary to its statutory purpose. In contrast, the court in *Marquis v. City of Spokane*,[3] decided the same day as *Griffin*, properly followed these rules by correctly deferring to the Commission's interpretation of the Law Against Discrimination when it granted independent contractors the right to bring a cause of action for violations of their civil rights.

This Note argues that the *Griffin* court was wrong not to defer to the Human Rights Commission's construction of the Law Against Discrimination. Part I details the Act and its legislative history. Part II discusses the principles behind judicial deference to administrative construction in general, Washington's approach in particular, and how the Washington courts have treated administrative construction of the Act in the past. Part III reviews the *Griffin* and *Marquis* decisions. Finally, Part IV criticizes *Griffin* and argues that the court should continue to follow the established rules of judicial deference and give substantial deference to the Commission's construction of the Law Against Discrimination, as long as that construction is reasonably consistent with legislative intent and is necessary to further the policies and purposes of the Act.

I. WASHINGTON'S LAW AGAINST DISCRIMINATION

A. The Act

Washington's Law Against Discrimination[4] is a broad remedial statute, the purpose of which is to eliminate and prevent discrimination against Washington inhabitants on the basis of race, creed, color,

2. 130 Wash. 2d 58, 922 P.2d 788 (1996).

3. 130 Wash. 2d 97, 922 P.2d 43 (1996).

4. Wash. Rev. Code ch. 49.60.

national origin, sex, or the presence of any sensory, mental, or physical disability.[5] The Act declares that the right to be free from such discrimination is a civil right enforceable by private civil action by members of the enumerated protected classes.[6] Further, the Law Against Discrimination may not be construed to deny any person the right to bring a cause of action for a violation of his or her civil rights.[7] Although this general civil right encompasses those rights expressly enumerated in the Act, that list of rights is not exclusive.[8]

The Law Against Discrimination also defines and proscribes a number of prohibited "unfair practices" against members of protected classes. Thus, it is an unfair practice to engage in a discriminatory act against a member of a protected class with respect to the following activities: applying for and receiving credit;[9] acquiring and maintaining insurance;[10] conducting real estate transactions, furnishing real estate facilities, or providing real estate services;[11] using and enjoying places of public resort, accommodation, assemblage, or amusement;[12] obtaining and maintaining employment;[13] and requiring HIV testing as a condition for employment.[14] In contrast to violations of the general civil right to be free from discrimination, unfair practices are subject to both private civil and administrative remedies.[15]

The Act created the Washington State Human Rights Commission and grants it general jurisdiction and powers,[16] including the authority to "adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the provisions" of the Act and the "policies and practices of the

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5. *See* § 49.60.010. Other protected classes include families with children, marital status, age, and the use of a trained guide dog or service dog by a disabled person. *See* § 49.60.010.

6. *See* § 49.60.030(1), (2).

7. *See* § 49.60.020.

8. *See* § 49.60.030(1). The provision states that the general civil right to be free from discrimination "shall include, but not be limited to" the areas of employment; places of public resort, accommodation, assemblage, or amusement; real estate transactions; credit transactions; insurance transactions; and commerce. § 49.60.030(1).

9. *See* §§ 49.60.175–.176.

10. *See* § 49.60.178 (1996).

11. *See* § 49.60.222 (1996).

12. *See* § 49.60.215 (1996).

13. *See* § 49.60.180 (1996).

14. *See* § 49.60.172 (1996).

15. *See* § 49.60.020 (1996) (granting right to pursue any civil remedy for violation of person's civil rights); § 49.60.030(2) (1996) (granting right to bring civil action for any violation of Act); § 49.60.120(4) (1996) (limiting Commission to receiving, partially investigating, and passing upon complaints alleging "unfair practices" as defined in Act).

16. *See* § 49.60.010 (1996).

commission in connection therewith."[17] The Commission also may "receive, impartially investigate, and pass upon complaints alleging unfair practices" as defined by the Act.[18] Finally, language in the Act mandates liberal construction to accomplish its purposes,[19] which has been interpreted to mean that the Act's protections against discrimination must be construed liberally and its exceptions narrowly confined.[20]

B. Legislative History

The Law Against Discrimination was enacted in 1949 to eliminate and prevent discrimination in employment against Washington inhabitants because of race, creed, color, or national origin,[21] and thus was originally much narrower in scope than it is now. Accordingly, the general civil right to be free from discrimination covered fewer protected classes and was limited to employment.[22] Further, employers were defined to include only those employers who employ eight or more persons.[23] The 1949 law, however, mandated liberal construction[24] and provided the Human Rights Commission with the same general jurisdiction and powers that it currently possesses.[25] But because no right to bring private civil actions was granted by the 1949 law, the Commission effectively had exclusive jurisdiction over enforcement of the Act.

The scope of the Act has expanded considerably over the past five decades to achieve its current broad remedial form. The Law Against Discrimination was amended in 1957 to provide the right to any person to pursue any action or remedy for a violation of his or her civil rights,[26] and again in 1973 to establish the right to bring a private civil action by any person for specific violations of the Act.[27] Thus, although the right

17. § 49.60.120(3) (1996).

18. § 49.60.120(4).

19. *See* § 49.60.020.

20. *See* Phillips v. City of Seattle, 111 Wash. 2d 903, 908, 766 P.2d 1099, 1102 (1989).

21. *See* Law Against Discrimination, ch. 183, § 1, 1949 Wash. Laws 506.

22. *See* § 12, 1949 Wash. Laws at 517.

23. *See* § 3(b), 1949 Wash. Laws at 507. "Employer" also did not include "any religious, charitable, educational, social, or fraternal association or corporation, not organized for private profit." 1949 Wash. Laws at 507.

24. *See* § 12, 1949 Wash. Laws at 517.

25. *Compare* Wash. Rev. Code § 49.60.010 (1996) *with* § 1, 1949 Wash. Laws at 506.

26. *See* Law Against Discrimination, ch. 37, § 2, 1957 Wash. Laws 108.

27. *See* Law Against Discrimination, ch. 141, § 3(d)(2), 1973 Wash. Laws 420.

to bring a cause of action for both violations of the general civil right to be free from discrimination and unfair practices was well established by 1973, the jurisdiction of the Human Rights Commission continued to be limited to unfair practices. In addition, the list of rights and the number of classes protected by the Act underwent a similar, gradual expansion over the years.[28]

II. JUDICIAL DEFERENCE TO ADMINISTRATIVE CONSTRUCTION

The scope of judicial review of administrative agency regulations is still a controversial area of law.[29] At the center of this controversy is a debate over the extent to which the authority to interpret statutes may be divided between agencies and courts.[30] If administrative agencies exercise too much interpretive authority, the separation of powers principle may be compromised.[31] But if courts infringe upon an agency's valid exercise of its interpretive authority, then the agency may not be able to perform its regulatory role effectively.[32] Therefore, deference to an agency's interpretation of the law is often appropriate, or even required, depending on the factors taken into consideration by the reviewing court.[33]

Prior to 1984, there was no unifying principle clarifying when courts were to defer to the construction of statutes provided by administrative agencies.[34] Instead, courts adhered to certain established rules of judicial

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28. *See, e.g.*, Law Against Discrimination, ch. 259, § 1, 1995 Wash. Laws 952 (families with children); Law Against Discrimination, ch. 510, § 3, 1993 Wash. Laws 2232–33 (use of trained guide dog or service dog by disabled person); Law Against Discrimination, ch. 206, §§ 902–903, 1988 Wash. Laws 961–62 (HIV infection); Law Against Discrimination, ch. 214, § 3, 1973 Wash. Laws 1649 (handicap); Law Against Discrimination, ch. 141, § 1, 1973 Wash. Laws 419 (credit transactions, insurance transactions, sex, marital status, and age); Law Against Discrimination, 1st ex. s. ch. 167, § 2, 1969 Wash. Laws 1172 (real estate transactions); Law Against Discrimination, ch. 141, § 3, 1957 Wash. Laws 108–09 (places of public resort, accommodation, assemblage, and amusement).

29. *See* Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1159 (1995).

30. *See* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. Pa. L. Rev. 549, 550–51 (1985).

31. *See* Asimow, *supra* note 29, at 1159.

32. *Id.*

33. *See* Theodore L. Garrett, *Judicial Review After* Chevron: *The Courts Reassert Their Role*, 10 Nat. Resources & Env't 59 (1995).

34. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 972 (1992).

deference. In 1984, the U.S. Supreme Court in *Chevron v. Natural Resources Defense Council, Inc.*[35] established a two-part test for the federal courts to use to determine when such deference must be given.[36] Courts that continue to follow the pre-*Chevron* approach, however, take into account a number of considerations in determining whether to defer to an agency's construction, including the following factors: whether the legislature has "delegated rule making authority to the agency"; whether judicial deference to agency interpretations was intended by the legislature; whether the agency has expertise in the particular matter; whether "the agency's interpretation was contemporaneous with the statute in question"; and whether a subsequent legislature, "aware of the agency's interpretation, ratified the agency's view."[37] The more these factors indicate an agency's authority to interpret legislative intent and its ability to interpret that intent accurately, the more likely courts will defer to it.

A. Judicial Deference to Administrative Construction in General

Because the primary goal of statutory interpretation is to find and give effect to legislative intent as expressed in the language of the statute in question, courts may look to an administrative construction of that statute only if the statutory language is ambiguous.[38] The Legislature, however, may have made a clear delegation of interpretive authority to the administering agency. In that case, the reviewing court must refrain from substituting its own interpretation for that of the agency, as long as the agency's interpretation is not irrational.[39] Between these two extremes, the deference accorded to an administrative interpretation depends on the importance of the various factors considered by the reviewing court.

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35. 467 U.S. 837 (1984).

36. This test has two parts: (1) if the statute unambiguously expresses the intent of Congress by speaking directly on the issue in question, then that is the end of the matter and no deference will be given to an agency's construction, and (2) if the statute is silent or ambiguous with respect to the specific issue, then the court must defer to the agency's construction of the statute it administers as long as that construction is based on a permissible interpretation of the statute. *Id.* at 842–43.

37. *See* Garrett, *supra* note 33, at 59. Other factors include whether "the agency's interpretation is long-standing or consistent with earlier interpretations" and whether "the agency engaged in a thorough and reasoned analysis in reaching its interpretation." *Id.*

38. *See* Rozner v. City of Bellevue, 116 Wash. 2d 342, 347, 804 P.2d 24, 27 (1991).

39. *See* Diver, *supra* note 30, at 570 (quoting Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568 (1980)). "Clear evidence of interpretive intent" will be rare, however, because the legislature "seldom provides explicit guidance" on how courts are to interpret the statutory language. *Id.*

Delegation of interpretive authority to an administrative agency, "congruence" between legislative intent and the agency's construction, and the specific attributes of the agency's interpretation probably are the most important factors considered by courts.[40] The deference accorded to an administrative regulation depends to a large extent on whether the Legislature has made a specific delegation of legislative rule-making authority to the regulatory agency. Regulations promulgated pursuant to such delegated authority are entitled to great deference, while regulations lacking "specific delegated authority" may exert at most a persuasive influence.[41]

Deference also may be appropriate if the administrative agency possesses a "comparative interpretive advantage" over the reviewing court.[42] Because agencies often are "immersed" in the administration of a particular statute, they often become specialists in that area of the law, whereas courts tend to remain generalists.[43] Such specialization gives agencies the ability to gain a better grasp of technical terms or the practical consequences of a decision.[44] Further, as a specialist, an agency often possesses "intimate knowledge" of specific problems dealt with by the statute and the various "administrative consequences" resulting from particular interpretations.[45] Courts often lack the time, personnel, and resources available to an administrative agency and thus may not be able to interpret a particular statute as accurately as the agency could.[46]

Other factors may operate to convince a court to defer to an administrative construction. Courts defer to an agency's long-standing construction that has been consistently maintained because such construction is likely to induce reliance on the part of the public or other agencies.[47] In addition, if the construction was considered carefully by the responsible agency and supported by reasoned analysis, it will be accorded greater deference.[48] Further, an administrative construction promulgated contemporaneously with the enactment of the statute is entitled to even more weight because the agency most likely either

40. *See* Merrill, *supra* note 34, at 973.

41. *Id.* at 973; *see also* 1 Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.3 (3d ed. 1994).

42. *See* Asimow, *supra* note 29, at 1195.

43. *Id.* at 1196.

44. *See* Merrill, *supra* note 34, at 973.

45. *See* Asimow, *supra* note 29, at 1196.

46. *See* Diver, *supra* note 30, at 575.

47. *See* Asimow, *supra* note 29, at 1197; Merrill, *supra* note 34, at 973.

48. *See* Asimow, *supra* note 29, at 1196; Merrill, *supra* note 34, at 974.

participated in the drafting of the legislation or otherwise was familiar with the assumptions inherent in the legislative process.[49] Finally, if the statute is reenacted with knowledge of the prior administrative construction and is not modified in a way suggesting a rejection of that construction, then again deference is due.[50]

B. *Washington's Approach to Judicial Deference to Administrative Construction*

Under Washington law, an administrative agency has only the powers and authority either expressly granted or necessarily implied to it by the Legislature.[51] Although an administrative agency may not promulgate regulations that amend or change a statute, it may "fill in the gaps" if needed to effect the general statutory scheme.[52] In addition, courts are to presume that an administrative regulation "adopted pursuant to a legislative grant of authority" is valid, and must uphold the regulation if it is reasonably consistent with the statute being implemented.[53] Further, the Legislature may delegate to an administrative agency the power to determine "a fact or state of things upon which application of the law is made to depend," provided the relevant statute enunciates standards to guide the agency.[54]

Washington courts take into account a variety of factors in determining when to defer to an administrative construction. The importance placed on each factor, however, is not uniform. Great weight is given to the construction of a statute by the agency responsible for administering it, if the construction is reasonably consistent with the statute being implemented and there is no compelling indication that it conflicts with legislative intent.[55] Even greater deference must be given to the contemporaneous construction of a statute, if that construction is accompanied by silent legislative acquiescence over a long period of

49. *See* Asimow, *supra* note 29, at 1197; Merrill, *supra* note 34, at 974.

50. *See* Asimow, *supra* note 29, at 1197; Merrill, *supra* note 34, at 974.

51. *See* Fahn v. Cowlitz County, 93 Wash. 2d 368, 374, 610 P.2d 857, 860 (1980); Gugin v. Sonico, Inc., 68 Wash. App. 826, 829, 846 P.2d 571, 573 (1993).

52. *See Gugin*, 68 Wash. App. at 829, 846 P.2d at 573.

53. *See Fahn*, 93 Wash. 2d at 374, 610 P.2d at 860.

54. *Id.*

55. *See* Washington Water Power Co. v. Washington State Human Rights Comm'n, 91 Wash. 2d 62, 68–69, 586 P.2d 1149, 1153 (1978).

time.[56] An administrative construction that is outside an agency's field of expertise is entitled to no special deference.[57] The deference accorded to an administrative agency also may depend in part upon "the particular combination of facts, statutes, regulations, and underlying public policies" of each case.[58] Thus, even though Washington Supreme Court decisions reveal at times a "varying intensity" of judicial review, Washington courts usually give deference to the content of an administrative regulation, particularly if the statute being implemented is ambiguous or states broad remedial goals.[59]

C. *Application of Judicial Deference to Administrative Construction of the Act*

Washington courts have given substantial deference to the Human Rights Commission's constructions of the Law Against Discrimination because of the Commission's broad rule-making and policy-formulation powers and administrative expertise. The Washington Supreme Court has held that the Legislature intended to give the Human Rights Commission "broad powers to investigate and formulate policies with respect to practices which involve discrimination based upon those attributes, conditions, and situations" the Legislature had found to constitute "an unfair basis for such discrimination."[60] According to the court, the Legislature did not "attempt to designate" all practices constituting discrimination, but rather granted the Commission "the authority to do so."[61] Further, the court noted that the Legislature recognized that "the diligence and expertise of an administrative agency" was necessary to achieve the purposes of the Law Against Discrimination, and that the different forms of prohibited discrimination,

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56. *See* Newschwander v. Board of Trustees of the Wash. State Teachers' Retirement Sys., 94 Wash. 2d 701, 711, 620 P.2d 88, 94 (1980) (giving great weight to regulation interpreting statute governing rights and duties of teachers with Teachers' Retirement System credit, adopted by Washington State Teachers' Retirement System Board of Trustees "immediately" following enactment of statute in 1963).

57. Russell v. Department of Human Rights, 70 Wash. App. 408, 412, 854 P.2d 1087, 1090 (1993) (finding that although City of Seattle's Department of Human Rights was entitled to "no special deference" with respect to applicability of court rule governing relation back of amended pleadings, because Department had no expertise in interpreting court rules, it did not err in concluding that Russell had engaged in employment discrimination).

58. *See* Tim J. Filer, *The Scope of Judicial Review of Agency Actions in Washington Revisited—Doctrine, Analysis, and Proposed Revisions*, 60 Wash. L. Rev. 653, 660 (1985).

59. *Id.* at 665–66.

60. *See Washington Water Power Co.*, 91 Wash. 2d at 67–68, 586 P.2d at 1153.

61. *Id.* at 68, 586 P.2d at 1153.

"taken in conjunction with the statement of policy and purpose," serve as "guidelines" for the Human Rights Commission.[62] The Commission's authority to promulgate regulations, however, does not include the power to amend or change legislative enactments.[63] In general, Washington courts have refused to defer to the Human Rights Commission's constructions of the Law Against Discrimination only when it has issued a regulation that clearly amends the Act.

1. *Washington Courts Defer to the Commission's Constructions of the Act When Consistent with Legislative Intent and Within the Commission's Powers and Authority*

Courts often look to and rely on the Commission's construction of the Law Against Discrimination when the statutory language is ambiguous or the legislative intent is unclear. In *Washington Water Power Co. v. Washington State Human Rights Commission*,[64] the Washington Supreme Court held that the Commission was justified in finding that the Legislature did not intend the Act "to restrict its coverage to cases where the employer refuses to hire any married person or any unmarried person."[65] The Commission had interpreted the Act to bar discrimination against any employee or job applicant because of the person's marital status, who his or her spouse is, or what the spouse does.[66] The court held that this interpretation did not exceed the Commission's authority because such discrimination necessarily involves the examination of an employee's marital status.[67]

The Washington Supreme Court deferred to the Human Rights Commission's construction of the Law Against Discrimination in adopting its definition of the term "age." In *Gross v. City of Lynnwood*,[68] the court agreed with the Commission that the language in one statute, making it an unfair practice to refuse to employ persons between the

62. *Id.* at 68–69, 586 P.2d at 1153.

63. *See* Fahn v. Cowlitz County, 93 Wash. 2d 368, 383, 610 P.2d 857, 865 (1980).

64. 91 Wash. 2d 62, 586 P.2d 1149.

65. *Id.* at 69, 586 P.2d at 1153.

66. *See* Wash. Admin. Code § 162-16-150(2) (1995).

67. *Washington Water Power Co.*, 91 Wash. 2d at 68, 586 P.2d at 1153. The court thus found that an "anti-nepotism" policy, whereby Washington businesses refused to hire the spouses of employees, was an unfair practice based on marital status discrimination and therefore prohibited by the Act. *Id.* at 69, 586 P.2d at 1154; *see also* Magula v. Benton Franklin Title Co., 131 Wash. 2d 171, 930 P.2d 307 (1997) (also adopting Commission's construction of term "marital status").

68. 90 Wash. 2d 395, 583 P.2d 1197 (1978).

ages of forty and sixty-five,[69] qualified the prohibition against age discrimination in employment contained in the Act, which does not itself define the term "age."[70] The court held that the general purpose of an age discrimination statute, providing protection for older workers in obtaining or maintaining employment, was "clearly reflected" in the regulations promulgated by the Commission.[71] In noting that the regulations were "entitled to considerable deference" because they were the construction of a statute "by those whose duty it is to administer its terms," the court adopted the Commission's interpretation.[72]

Courts also have relied on and given great deference to the Commission's construction of the scope of the term "handicap."[73] In *Barnes v. Washington Natural Gas Co.*,[74] the court of appeals had to decide whether a person perceived to have a handicap, but who was not handicapped, should be considered handicapped for the purposes of the Act.[75] The Human Rights Commission had issued a regulation stating that "handicap" includes circumstances where a sensory, mental, or physical condition is "perceived to exist, whether or not it exists in fact,"[76] and the court found this interpretation to be within the scope of the Act.[77] In recognizing the statutory mandate for liberal construction and the Commission's "broad discretion and responsibility" for administering the Act, the court found that legislative purpose would be defeated if the handicap provisions were limited only to those persons actually afflicted with a handicap.[78]

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69. *See* Law Against Discrimination, ch. 100, § 5, 1961 Wash. Laws 1588–89 (codified as amended at Wash. Rev. Code § 49.44.090).

70. *Gross*, 90 Wash. 2d at 399 n.6, 583 P.2d at 1200 n.6 (citing older version of Wash. Admin. Code § 160-04-010(2), (12)). "Age" now means between 40 and 70. *See* Wash. Admin. Code § 162-04-010 (1995).

71. *Gross*, 90 Wash. 2d at 399, 583 P.2d at 1199.

72. *Id.* The court thus found that the City of Lynnwood and its civil service commission's refusal to appoint Gross to the position of fire fighter because he was 35 years old and therefore ineligible for enrollment in a mandatory retirement system did not violate the age discrimination provisions of the Act. *Id.* at 396–401, 583 P.2d at 1198–1200.

73. The Act no longer uses the term "handicap." Instead, that term has been replaced by the term "disability." *See* Law Against Discrimination, ch. 510, §§ 1–20, 1993 Wash. Laws 2331–43 (codified as amended at Wash. Rev. Code ch. 49.60).

74. 22 Wash. App. 576, 591 P.2d 461 (1979).

75. *See id.* at 577, 591 P.2d at 462.

76. *See* Wash. Admin. Code § 162-22-040(1) (1995).

77. *See Barnes*, 22 Wash. App. at 583, 591 P.2d at 465.

78. *Id.* at 581–82, 591 P.2d at 464. The court thus held that Barnes had standing to maintain a cause of action against the Washington Natural Gas Company for allegedly discharging him from his job because he was handicapped. *See id.* at 583, 591 P.2d at 465; *see also* Kimmel v. Crowley

The Washington Supreme Court, in *Phillips v. City of Seattle*,[79] again deferred to the Commission's definition of handicap and declined to apply the stricter affirmative action definition of the term. In so holding, the court noted that "a large number of people" would be excluded from the protection of the Act if the affirmative action definition is used in unfair practice cases.[80] The court further justified its ruling by emphasizing that it had a duty both to construe the Act liberally to accomplish the purposes of the Legislature and to give great weight to the Commission's definition of handicap for unfair practice claims.[81]

Finally, the Washington Supreme Court has allowed the Human Rights Commission to narrow the scope of ambiguous statutory terms when interpreting the terms broadly would run counter to the purposes of the Act. In *Bennett v. Hardy*,[82] the court refused to apply the definition of "employer" outside the Law Against Discrimination so as to bar an implied cause of action brought under a separate age employment discrimination statute.[83] The court held that applying any limiting aspect outside the Act itself would be inconsistent with its "express statements of broad purpose."[84] The limiting aspect at issue concerned the small employee exemption under the Act's definition of employer.[85] The Commission had interpreted the principal purposes of that exemption to be (1) to "relieve small businesses of a regulatory burden," and (2) in "the interest of cost effectiveness, to confine public agency enforcement of the law to those employers whose practices affect a substantial number of persons."[86] The court found that these

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Maritime Corp., 23 Wash. App. 78, 596 P.2d 1069 (1979) (adopting Commission's definition of term "handicap" in finding that person, whose handicap does not prevent him from properly performing job he seeks, is handicapped).

79. 111 Wash. 2d 903, 766 P.2d 1099 (1989).

80. *Id.* at 908, 766 P.2d at 1102. The court held, however, that Phillips, who was diagnosed as a "periodic alcoholic," was terminated by the City of Seattle solely because of his absenteeism from his job and not because he had a handicap. *See id.* at 911, 766 P.2d at 1103–04.

81. *See id.* at 908, 766 P.2d at 1102; *see also* Doe v. Boeing Co., 121 Wash. 2d 8, 846 P.2d 531 (1993) (using Commission's definition of term "handicap" to find that transsexualism was not handicap for enforcement purposes in unfair practice cases).

82. 113 Wash. 2d 912, 784 P.2d 1258 (1990).

83. *See id.* at 929, 784 P.2d at 1266.

84. *Id.* at 928, 784 P.2d at 1265. The court thus found that Bennett could bring a tort claim for wrongful discharge based upon her age and in retaliation for her opposition to her employer's discriminatory practices. *Id.* at 929, 922 P.2d at 1266.

85. The Act defines the term "employer" as including "any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit." Wash. Rev. Code § 49.60.040(3) (1996).

86. *See* Wash. Admin. Code § 162-16-160(2) (1995).

purposes "will in no way be interfered with by permitting private causes of action against employers whose size keeps them outside the scope of public agency regulation," and, moreover, that permitting such causes of action by individual plaintiffs could only assist the Human Rights Commission "in furthering the goal of preventing and eliminating employment discrimination."[87] The court also found that it could consider the Commission's construction because it was a contemporaneous construction of the Act that had been accompanied by silent legislative acquiescence over a long period of time.[88]

2. *No Deference Is Given when the Commission Has Clearly Amended or Changed the Act*

Although courts retain the ultimate authority to determine the meaning of the Law Against Discrimination, and thus may substitute their own interpretation for that of the Human Rights Commission, they generally have done so only when the Commission clearly has abused its delegated powers by amending or changing the Act in some way.

In *Fahn v. Cowlitz County*,[89] the Washington Supreme Court invalidated part of a Commission regulation that declared when pre-employment inquiries relating to the height and weight of job applicants could be conducted.[90] The regulation stated that being a certain height and weight could not be considered a job requirement unless the employer could show that no employee with the ineligible height or weight could do the work, and it specified that any such inquiry not based on actual job requirements was an unfair pre-employment inquiry.[91] Because of "the broad directive from the Legislature," the court found that it was "well within" the Commission's authority to determine that such inquiries, when not related to the requirements of the job, constitute unfair employment practices if they unfavorably impact a protected class.[92] Because the regulation prevented pre-employment height and weight inquiries in "virtually all" situations, however, the court found that "in effect" it created a new protected class

87. *Bennett*, 113 Wash. 2d at 929, 784 P.2d at 1266.

88. *See id.* at 927, 784 P.2d at 1265.

89. 93 Wash. 2d 368, 610 P.2d 857 (1980).

90. *See id.* at 370–71, 610 P.2d at 858–59.

91. *See* Wash. Admin. Code § 162-12-140(3)(g) (1995).

92. *See Fahn*, 93 Wash. 2d at 377, 610 P.2d at 862. Women and some minority groups, such as Mexican-Americans, were found to have been unfavorably impacted. *See id.* at 376, 610 P.2d at 861.

based on height and weight.[93] This was a power that the court found is not granted to administrative agencies.[94]

In *Gugin v. Sonico, Inc.*,[95] the Washington Court of Appeals invalidated a regulation promulgated by the Human Rights Commission that made it an unfair practice for an employer "to refuse to hire or otherwise discriminate against a person simply because he or she has been convicted of a crime."[96] The Commission found that "an employment practice which automatically excludes a person with a prior criminal conviction" had the potential to discriminate.[97] The court, however, held that the regulation created an additional class protected by the Law Against Discrimination, composed of all persons who had been convicted of a crime, and that it therefore exceeded the Commission's delegated powers and authority.[98]

Washington courts have deferred to constructions of the Law Against Discrimination by the Human Rights Commission where such constructions are necessary to further the purposes of the Act. Thus, courts have adopted the Commission's interpretation of the definitions of marital status, age, handicap, and employer, even though these constructions appear to go further than the language of the Act itself. Such deference is appropriate because effective implementation of the Act requires an agency that can administer and enforce its provisions in a manner that is both consistent with legislative intent and responsive to new or unanticipated forms of discrimination. In contrast, the courts have struck down those constructions of the Act issued by the Commission that clearly change the meaning of the Act beyond what the Legislature had intended. This is particularly true where the Commission creates a new protected class or right. Thus, regulations interpreting the Act to bar discrimination on the basis of height and weight or prior criminal convictions alone have been held invalid. Deference should not

93. *Id.* at 383, 610 P.2d at 865. The court thus reversed the trial court's order of summary judgment and remanded the case for trial on the issue of whether Fahn had been discriminated against in applying for a deputy sheriff's position for which all applicants were required to be at least 5'9" tall. *See id.* at 383–84, 610 P.2d at 865.

94. *See id.* at 383, 610 P.2d at 865.

95. 68 Wash. App. 826, 846 P.2d 571 (1993).

96. *Id.* at 828, 846 P.2d at 572 (quoting Wash. Admin. Code § 162-16-060(1)). The regulation also stated that "the conviction may be considered to the extent that it reveals the current presence or absence of specific qualifications for a job." Wash. Admin. Code § 162-16-060(1).

97. *Gugin*, 68 Wash. App. at 830, 846 P.2d at 573.

98. *See id.* at 831, 846 P.2d at 574. The court reversed a jury verdict in favor of Gugin's suit against Sonico, his former employer, on the basis that Gugin had been fired for having been convicted of a crime. *See id.* at 826–27, 846 P.2d at 572.

be given in these situations because such constructions clearly amend the Act, a power that only the Legislature may wield.

III. THE *GRIFFIN* AND *MARQUIS* DECISIONS

The Washington Supreme Court took two very different approaches to judicial deference to the Human Rights Commission's construction of the Law Against Discrimination in *Griffin v. Eller*[99] and *Marquis v. City of Spokane*.[100] In *Griffin*, the court declined to give any deference to the Commission's construction of the Act's definition of employer, holding that employers with fewer than eight employees are exempt from the entire Act rather than just from administrative remedies.[101] In *Marquis*, however, the court gave substantial deference to the Commission's construction of the Law Against Discrimination, granting independent contractors the right to bring a cause of action for violations of their civil rights, and held that the Act did grant such a right.[102] The differences in the court's approaches are striking considering that the two cases were decided on the same day.[103]

A. Griffin v. Eller

1. Facts and Procedural History

Sharon Griffin was hired in September, 1990 by Carson Eller to be his legal secretary, and, during the time she worked for him, was his only full-time employee.[104] In July 1991, Eller terminated Griffin, indicating that he could no longer afford to employ her.[105] Griffin alleged that she had been subjected to a hostile work environment and that she had been terminated in retaliation for her objections.[106] Griffin brought a civil action against Eller for sexual harassment and retaliation in violation of the Law Against Discrimination, wrongful termination in violation of public policy, negligent infliction of emotional distress,

99. 130 Wash. 2d 58, 922 P.2d 788 (1996).

100. 130 Wash. 2d 97, 922 P.2d 43 (1996).

101. *See Griffin*, 130 Wash. 2d at 61, 922 P.2d at 789.

102. *See Marquis*, 130 Wash. 2d at 100, 922 P.2d at 45.

103. *See Marquis*, 130 Wash. 2d at 97, 922 P.2d at 43; *Griffin*, 130 Wash. 2d at 58, 922 P.2d at 788.

104. *See Griffin*, 130 Wash. 2d at 61, 922 P.2d at 789.

105. *See id.* at 61–62, 922 P.2d at 789.

106. *See id.* at 62, 922 P.2d at 789.

outrage, and failure to pay wages.[107] The trial court granted partial summary judgment, dismissing the sexual harassment and retaliation claims. Griffin appealed to the Washington Supreme Court.[108]

2. *The Court Interpreted the Act To Exempt All Employers with Fewer than Eight Employees*

The Washington Supreme Court affirmed the dismissal of the claims. In interpreting the Law Against Discrimination's definition of "employer" to exempt all employers who have less than eight employees,[109] the court found no legislative history suggesting the Legislature intended to permit "a statutory cause of action against small, otherwise exempt, employers."[110] Because *Griffin* dealt with a "statutory exemption," rather than with "statutory silence," as in *Marquis*,[111] the court distinguished the two cases.[112] The court stated that "an employer which does not meet the statutory definition" is simply "exempt."[113]

The court declined to give any deference to the Human Rights Commission's construction of the statutory purposes for the small employer exemption. The Commission interpreted these purposes to be (1) to "relieve small employers of a regulatory burden," and (2) in "the interest of cost effectiveness, to confine public agency enforcement of the law to employers whose practices affect a substantial number of persons."[114] Thus, under this construction, the small employer exemption applies only to the jurisdiction of the Commission. Although the court recognized that "great weight" must be given the Human Rights Commission's "contemporaneous construction" of the Act if that construction "has been accompanied by silent acquiescence of the legislative body over a long period of time,"[115] the court found that this regulation was "hardly a 'contemporaneous' construction of the

107. *See id.*

108. *See id.*

109. *See* Wash. Rev. Code § 49.60.040(3) (1996); *see also supra* note 77.

110. *See Griffin*, 130 Wash. 2d at 63, 922 P.2d at 790.

111. *See infra* Part III.B.

112. *See Griffin*, 130 Wash. 2d at 63, 922 P.2d at 790.

113. *Id.* at 64, 922 P.2d at 790.

114. Wash. Admin. Code § 162-16-160(2) (1995).

115. *See Griffin*, 130 Wash. 2d at 68, 922 P.2d at 792 (quoting Newschwander v. Board of Trustees of the Wash. State Teachers' Retirement Sys., 94 Wash. 2d 701, 711, 620 P.2d 88, 94 (1980)).

statutory definition" and thus declined to adopt it.[116] The court also observed that the Legislature may have had other legitimate reasons, in addition to those provided by the Commission, for exempting small employers.[117]

3. *The Dissent*

The dissent argued that because there must be a "means by which to vindicate and maintain" the right to be free from discrimination in employment granted by the Law Against Discrimination, the majority had rendered this "statutory imperative" powerless as to those persons who work for small employers.[118] The dissent also criticized the majority for ignoring statutory language granting any person injured by a violation of the Act, including any violation of the right to be free from discrimination, the right to bring a cause of action to enforce that right. Had the Legislature intended to deny this right to persons who work for small employers, the dissent argued, it could have made such an intention clear in other provisions of the Act.[119]

The dissent also criticized the majority for not giving effect to a harmonious interpretation of the whole Act.[120] The dissent argued that the Act established two different kinds of discriminatory conduct: "unfair practices" subject to the jurisdiction of the Human Rights Commission and the "general civil right" to be free from discrimination to be enforced through private civil and criminal remedies.[121] In addition, the dissent argued that the majority's interpretation of the Law Against Discrimination resulted in "unlikely, absurd or strained consequences"; persons employed by large employers are protected, while "hundreds of thousands" of persons working for small employers are not protected.[122]

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116. *Id.* at 69, 922 P.2d at 792. The court found that, whereas the definition had been enacted in 1949 with the original version of the Act, the regulation had not been promulgated until 1982, 33 years after the Act was first enacted and nine years after the private cause of action was created in 1973. *See id.*

117. *See id.*

118. *See id.* at 74–75, 922 P.2d at 795 (Talmadge, J., dissenting).

119. *See id.* at 77, 922 P.2d at 796 (Talmadge, J., dissenting).

120. *See id.* at 77, 922 P.2d at 796–97 (Talmadge, J., dissenting).

121. *See id.* at 78–79, 922 P.2d at 797 (Talmadge, J., dissenting).

122. *See id.* at 80–81, 922 P.2d at 798 (Talmadge, J., dissenting). In 1992, approximately 75% of all Washington business establishments employed less than nine employees, and those establishments employed about 17.5% of the private employee work force. *Id.* at 68, 922 P.2d at 792 (citing U.S. Bureau of Census, *County Business Patterns 1992: Washington* 49 (1994)).

Finally, the dissent criticized the majority for not according deference to the Human Rights Commission's construction of the Act, which limited the statutory exemption only to administrative remedies.[123] The dissent argued that the Legislature had amended the Law Against Discrimination "dozens of times" without correcting the Commission's construction.[124] Also, the dissent argued that administrative constructions "need not be contemporaneous with [the] passage of the authorizing legislation" to acquire "legal force."[125]

B. Marquis v. City of Spokane

1. Facts and Procedural History

In December 1986, Patti Marquis entered into a three-year contract with the City of Spokane to serve as a golf professional at one of the City's three municipally-owned golf courses.[126] After learning that she was being paid markedly less than the City's two other golf professionals, both of whom were male, Marquis expressed her concern to the City's golf manager.[127] She also alleged that during the time she worked for the City, she was subjected to discriminatory treatment.[128] In December 1989, contract renewal negotiations began, but the City refused to renew unconditionally Marquis's contract.[129] The City offered a one-year probationary contract, which Marquis refused.[130] Marquis terminated negotiations, and her contract expired at the end of the year.[131]

Marquis filed a civil action against the City, alleging sex discrimination in violation of the Law Against Discrimination and Title VII of the Federal Civil Rights Act of 1964.[132] The trial court dismissed both the Title VII and state law claims, finding that neither act prohibited discrimination against independent contractors.[133] The court

123. *See id.* at 87–88, 922 P.2d at 801–02 (Talmadge, J., dissenting).

124. *See id.* at 89–90, 922 P.2d at 802–03 (Talmadge, J., dissenting).

125. *See id.* at 90, 922 P.2d at 803 (Talmadge, J., dissenting).

126. *See* Marquis v. City of Spokane, 130 Wash. 2d 97, 101, 922 P.2d 43, 45 (1996).

127. *See id.* at 101–02, 922 P.2d at 46.

128. *See id.* at 102, 922 P.2d at 46.

129. *See id.* at 102–03, 922 P.2d at 46.

130. *See id.* at 103, 922 P.2d at 46.

131. *See id.*

132. *See id.* at 103, 922 P.2d at 46–47.

133. *See id.* at 103–04, 922 P.2d at 47.

of appeals reversed, holding that the Law Against Discrimination could be interpreted to incorporate personal contract rights.[134] The Washington Supreme Court granted review to determine whether the Law Against Discrimination grants a cause of action to independent contractors.[135]

2. *The Court Found Independent Contractors Have the Right To Bring a Cause of Action*

The Washington Supreme Court affirmed the appellate court's decision.[136] The court found that the list of civil rights protected by the Law Against Discrimination was "nonexclusive," and that the extent of "the scope of those rights" had not been defined.[137] Thus, it was open to interpretation by the court. The court then acknowledged that the Act must be "interpreted in the manner that best fulfills the legislative purpose and intent," and that "liberal construction" is mandated.[138] Further, the court acknowledged that no person may be denied the right to bring a cause of action based on a "violation of his or her civil rights," and that it must "view with caution" constructions that "narrow the coverage of the law."[139]

The court also relied on a 1982 regulation promulgated by the Human Rights Commission, which declared that independent contractors are protected by the general civil right to be free from discrimination and thus may enforce that right through private civil action.[140] Recognizing that "great weight" must be given to the responsible agency's construction, the court found that independent contractors could bring a cause of action for violations of their civil rights.[141] The court also found that the regulation did not create a new protected class because

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134. *See id.* at 104, 922 P.2d at 47.

135. *See id.*

136. *See id.* at 116, 922 P.2d at 53.

137. *Id.* at 107, 922 P.2d at 49; *see* Wash. Rev. Code § 49.60.030(1) (1996).

138. *See Marquis*, 130 Wash. 2d at 108, 922 P.2d at 49.

139. *See id.* at 108, 922 P.2d at 49.

140. *Id.* at 111–12, 922 P.2d at 50–51. The regulation reads in relevant part:

> (2) Rights of independent contractor. While an independent contractors [sic] does not have the protection of RCW 49.60.180, the contractor is protected by RCW 49.60.030(1) from discrimination because of race, creed, color, national origin, sex, handicap, or foreign boycotts. The general civil right defined in RCW 49.60.030(1) is enforceable by private lawsuit in court under RCW 49.60.030(2) but not by actions of the Washington state human rights commission.

Wash. Admin. Code § 162-16-170(2) (1995).

141. *See Marquis*, 130 Wash. 2d at 112–13, 922 P.2d at 51.

independent contractors must prove they are members of a class already protected by the Act.[142]

3. *The Dissent*

The dissent criticized the majority for placing undue reliance on the Act's broad statement of policy and liberal construction, which the dissent implied resulted in a strained and unrealistic interpretation of the Law Against Discrimination.[143] The dissent argued that because independent contractors receive no mention in the Act, such a right should not be included within its scope because no protected right had ever been created by the Legislature without it also "simultaneously and expressly defining" a corresponding statutory violation in detail.[144] The dissent also criticized the majority for relying on the construction of the Act provided by the Human Rights Commission. The dissent argued that because the Commission had no special expertise in deciding whether the Legislature had intended to grant a cause of action to independent contractors, its regulation was in essence an agency amendment to the Act and it thus had exceeded its delegated authority by creating a new statutory right.[145] The dissent further argued that such a delegation of authority, even if granted by the Legislature, would be "an unconstitutional delegation of purely legislative authority,"[146] and that the court's decision was irreconcilable with its decision in *Griffin*.[147]

IV. CRITIQUE OF THE *GRIFFIN* DECISION

The *Griffin* court inexplicably ignored the established rules of judicial deference by refusing to give any deference to the Human Rights Commission's construction of the Law Against Discrimination's small employer exemption, which limited the exemption's applicability solely to administrative remedies. Instead, the court interpreted the Act to bar all persons who work for employers with fewer than eight employees from enforcing their civil rights, an interpretation of the Act that is contrary to legislative purpose and intent. In contrast, the court in *Marquis* properly applied the established principles of judicial deference

142. *See id.* at 112, 922 P.2d at 51.

143. *See id.* at 117, 922 P.2d at 54 (Madsen, J., dissenting).

144. *See id.* at 119, 922 P.2d at 54 (Madsen, J., dissenting).

145. *See id.* at 123, 922 P.2d at 56–57 (Madsen, J., dissenting).

146. *See id.* at 126, 922 P.2d at 58 (Madsen, J., dissenting).

147. *See id.* at 127, 922 P.2d at 59 (Madsen, J., dissenting).

by correctly deferring to the Commission's construction of the Act, which granted independent contractors the right to bring a cause of action for violations of their civil rights. These two approaches are wholly inconsistent. Whereas the *Marquis* court's approach demonstrates proper judicial deference to administrative construction of the Act, the approach followed in *Griffin* illustrates how the court compromises administrative agency authority and frustrates statutory purpose when it fails to apply properly the established rules of judicial deference. Further, *Griffin* shows that such an approach also produces both incorrect and inconsistent interpretations of legislative intent.

A. The Griffin *Court Ignored the Established Rules of Judicial Deference by Misinterpreting the Law Against Discrimination*

Because the *Griffin* court ignored the established rules of judicial deference in deciding whether to defer to the Human Rights Commission's interpretation of the small employer exemption, it misinterpreted the Law Against Discrimination. The issue before the court was whether the Act, which defines employers to include those employers who have eight or more employees, authorizes private civil actions to be brought against employers who have fewer than eight employees.[148] The court wrongly held that such employers are exempt from the Act, despite a 1982 regulation promulgated by the Human Rights Commission limiting that exemption to its own administrative jurisdiction. The reason the court gave for not deferring to this construction was that the construction had not been promulgated contemporaneously with the enactment of the provision of the Act defining employer.[149] By failing to apply correctly the established rules of judicial deference the *Griffin* court not only compromised the interpretive authority of a necessary administrative agency, but it also frustrated the purpose of the Law Against Discrimination.

1. The Court Inexplicably Failed To Follow the Established Rules of Judicial Deference in Evaluating the Commission's Construction of the Act

The court inexplicably failed to apply the established rules of judicial deference that courts use to determine when to defer to a construction of

148. *See* Wash. Rev. Code § 49.60.040(3) (1996).

149. *See* Griffin v. Eller, 130 Wash. 2d 58, 68–69, 922 P.2d 788, 792 (1996).

a statute provided by the agency responsible for administering it. Instead of determining whether the Commission's construction of the small employer exemption was a valid exercise of the Commission's authority, was reasonably consistent with the purpose of the Act, or was in conflict with legislative intent, as it should have done,[150] the court merely looked to see whether the construction had been promulgated contemporaneously with the enactment of the statutory provision defining the term employer.[151] Under established principles of judicial deference to administrative construction, however, the issue of contemporaneity is only one factor courts may consider in making their determinations.[152] In fact, there is no requirement that an administrative construction be contemporaneous with the statutory provision it interprets.[153]

Even if the issue of contemporaneity should be given weight by the court in evaluating the Human Rights Commission's construction of the small employer exemption, that issue is outweighed by other more important considerations. Because the Commission is the agency responsible for administering the Law Against Discrimination, and thus has acquired extensive expertise in this area, its constructions are entitled to deference.[154] This is particularly true where the Commission's construction of the Act is reasonably consistent with the purpose of the Act and there is no compelling indication that it conflicts with legislative intent.[155] The Commission's construction of the small employer exemption merely clarifies the statutory distinction between the general civil right to be free from discrimination and unfair practices with respect to those persons working for employers who have fewer than eight employees.[156] Thus, this construction, far from being an abuse of delegated authority, actually furthers the Legislature's intent that

150. *See* Washington Water Power Co. v. Washington State Human Rights Comm'n, 91 Wash. 2d 62, 68–69, 586 P.2d 1149, 1153 (1978).

151. *See Griffin*, 130 Wash. 2d at 68–69, 922 P.2d at 792.

152. *See supra* Part II.B.

153. As the dissent points out in *Griffin*, "Nothing in [Washington's Administrative Procedure Act] requires an agency to adopt a regulation before the expiration of some unspecified deadline following the enactment of a statute." *Griffin*, 130 Wash. 2d at 90, 922 P.2d at 803. Moreover, lack of contemporaneity was never an issue in *Marquis*, despite the fact that the construction under consideration in that case was promulgated during the same year. *See* Marquis v. City of Spokane, 130 Wash. 2d 97, 922 P.2d 43 (1996); *infra* Part IV.B.

154. *See* 1 Davis & Pierce, *supra* note 41, at 6.3; Merrill, *supra* note 34, at 973.

155. *See Washington Water Power Co.*, 91 Wash. 2d at 68–69, 586 P.2d at 1153.

156. *See* Wash. Admin. Code § 162-16-160(2) (1995) (expressly stating that small employers are exempt only "from the enforcement authority of the commission" but not from Act itself).

persons not be denied the right to pursue any action or remedy for violations of their civil rights.[157]

The issue of contemporaneity also is outweighed by the Human Rights Commission's authority to interpret the Law Against Discrimination and its comparative interpretive advantage over the courts. The Commission has been granted broad rule-making and policy-formulation powers with which to administer and enforce the Act.[158] The Washington Supreme Court has found that these delegated powers indicate a legislative recognition that because every situation in which discrimination might exist could not be known or anticipated when the Law Against Discrimination was enacted, the Commission was to use its "diligence and expertise" to achieve the purposes intended in the Act.[159] Thus, the courts consistently have recognized the Commission's authority to interpret the Law Against Discrimination.[160] Further, the investigative resources available to the Human Rights Commission and its decades-long experience in administering the Act give it a distinct comparative interpretive advantage over the courts.[161]

Finally, the issue of contemporaneity also must bow to the Human Rights Commission's careful consideration of its construction of the small employer exemption and the Legislature's silent acquiescence in that construction. The Commission clearly recognized the limitations placed on its authority to interpret the Law Against Discrimination when it interpreted the small employer exemption to be a limit only on its authority to enforce the Act with respect to employers who have fewer than eight employees.[162] Under this construction, persons who work for such employers still may not seek any administrative remedies for unfair practices in employment. Thus, the Human Rights Commission made a careful distinction between its limited enforcement powers and the general right to bring a cause of action for violations of the Act. Further, the Legislature has amended the Act a number of times since the construction was promulgated in 1982, and none of these amendments

157. *See* Wash. Rev. Code § 49.60.020 (1996).

158. *See Washington Water Power Co.*, 91 Wash. 2d at 69, 586 P.2d at 1153.

159. *See id.*

160. *See supra* Part II.C.1.

161. *See* Asimow, *supra* note 29, at 1195–97; Diver, *supra* note 30, at 575; Merrill, *supra* note 34, at 973–74.

162. *See supra* note 156.

indicate a rejection of the Commission's interpretation of the small employer exemption.[163]

2. *The Court's Approach to Judicial Deference to the Commission's Construction of the Small Employer Exemption Is Logically Flawed*

Even if the *Griffin* court was justified in emphasizing the issue of contemporaneity to the extent that it did, such emphasis contradicts the court's past reliance on the Human Rights Commission's construction of the small employer exemption. In *Bennett v. Hardy*,[164] a case the *Griffin* court used to support its decision, the court in dicta relied on the same construction of the small employer exemption to explain why the Legislature may have included a size limitation in the Act's definition of employer.[165] The *Bennett* court stated that it was appropriate to look to this construction because it was a contemporaneous construction and therefore must be accorded great weight.[166] Thus, the court still has yet to decide conclusively whether or not this construction is in fact contemporaneous.

The court also has agreed in the past with the content of the Human Rights Commission's construction of the small employer exemption. According to the Commission, the principal purposes of the small employer exemption are to relieve small businesses from a regulatory burden and to reduce administrative costs by restricting the Commission's regulatory authority to large employers.[167] The *Griffin* court noted that the Legislature may have had other reasons for enacting the small employer exemption.[168] Again, however, the court seems to have forgotten its earlier reliance on the Commission's construction in

163. *See* Griffin v. Eller, 130 Wash. 2d 53, 89 n.9, 922 P.2d 788, 802–03 n.9 (1996) (Talmadge, J., dissenting) (providing comprehensive list of these amendments). The dissent also noted:

> Since 1982, the Legislature has amended the Act dozens of times, affecting the pertinent statutory provisions at issue in this case. . . . Despite a 14-year track record of frequent and intense legislative scrutiny of the Act, and the powers, duties and very existence of the Commission, the Legislature chose not to correct the Commission's interpretation of the relationship between its own jurisdiction and the civil remedy to sue for discrimination. It is difficult to imagine a stronger case for legislative acquiescence.

Id. at 89–90, 922 P.2d at 802–03.

164. 113 Wash. 2d 912, 784 P.2d 1258 (1990).

165. *See id.* at 928–29, 784 P.2d at 1265–66.

166. *See id.* at 928, 922 P.2d at 1265.

167. *See* Wash. Admin. Code § 162-16-160(2) (1995).

168. *See Griffin*, 130 Wash. 2d at 69, 922 P.2d at 792.

Bennett. In support of its decision, interpreting the small employer exemption not to apply outside the Law Against Discrimination to limit causes of action under other unfair practice statutes, the *Bennett* court looked to the Commission's construction of the small employer exemption and found that allowing private causes of action against employers with fewer than eight employees only can assist the Commission in furthering the statutory goal of eliminating and preventing discrimination.[169]

3. *The* Griffin *Decision Both Compromises the Authority of an Administrative Agency and Frustrates the Purpose of the Act*

The *Griffin* court's logically inconsistent method of evaluating the Human Rights Commission's construction of the small employer exemption both compromises the Commission's interpretive authority and frustrates the purpose of the Law Against Discrimination. The court failed to recognize the crucial role the Commission serves in administering the Act. The Commission's administrative expertise, in addition to giving it a comparative advantage with respect to interpreting legislative intent, allows it to acquire extensive knowledge of the consequences associated with particular interpretations of the Act.[170] Thus, the Commission often may be better able to avoid those interpretations that produce real life consequences contrary to good public policy. If, however, the court, as it did in *Griffin*, begins to infringe on the Human Rights Commission's authority to interpret the Law Against Discrimination, then the Commission's ability to administer effectively and enforce the Act surely will be compromised. Although it is still too early to predict what effect this case will have on judicial deference to administrative construction of the Act, the *Griffin* court certainly has taken a step in the wrong direction.

The court's decision not to give any deference to the Human Rights Commission's construction and, therefore, to interpret the Law Against

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169. *See Bennett*, 113 Wash. 2d at 929, 784 P.2d at 1266.

170. *See* Diver, *supra* note 30, at 578, 589. Diver observes:

> Compared to agencies, courts possess only limited investigative resources and analytical faculties. They must rely, therefore, on less accurate estimates of consequential impacts. Thus, agencies seem to have greater access to the knowledge necessary to understand what is intended by statutory enactors. . . . [B]ecause agencies are more familiar with the range of policy choices likely to be affected by the interpretation at hand, there is little reason to expect courts to do a better job of reconciling these competing policies.

Id.

Discrimination to bar causes of action against employers with fewer than eight employees, also frustrates the statutory goal of eliminating and preventing discrimination. An interpretation that denies a large segment of the working population the ability to enforce their civil rights is contrary the intent of the Legislature,[171] especially considering the broad remedial nature of the Act and its statutory mandate of liberal construction. In addition, the denial of the protections of the state's civil rights statute to large numbers of people is the kind of unlikely, absurd, and strained consequence that must be avoided when interpreting a statute.[172] Furthermore, because the construction of the small employer exemption clearly indicates that the Commission recognizes the limits placed on its authority to interpret the Act, the danger that upholding this construction will result in too much interpretive authority being given to an administrative agency is small.

The court could have avoided this result, however, had it approached the issue of judicial deference to administrative construction of the Act in a manner consistent with the established rules of judicial deference. Thus the court should have considered whether the Human Rights Commission had abused its delegated powers by creating a new protected class, whether the construction was reasonably consistent with the intent of the Legislature, and whether the construction furthered the purposes of the statute—the elimination and prevention of prohibited discriminatory conduct. The court also should have carefully weighed the construction in light of the Commission's broad rule-making and policy-formulation powers and its long-standing administrative expertise. This approach preserves the balance of interpretive authority between the courts and the Commission, thus insuring that courts adopt the interpretation that best fulfills the intent of the Legislature and furthers the purposes of the statute.

B. *The Court's Approach in* Marquis *Demonstrates Proper Judicial Deference to Administrative Authority and Expertise*

In contrast to the *Griffin* court, the *Marquis* court properly applied the established rules of judicial deference in correctly deferring to the Human Rights Commission's construction of the Law Against

171. *See Griffin*, 130 Wash. 2d at 81, 922 P.2d at 798 (Talmadge, J., dissenting); *see also id.* at 68, 922 P.2d at 792 (citing U.S. Bureau of Census statistics showing that in 1992 three-quarters of all Washington businesses employed less than nine employees and that these businesses accounted for approximately 17.5% of private employee work force).

172. *See, e.g.*, State v. Mierz, 127 Wash. 2d 460, 480–81, 901 P.2d 286, 296 (1995).

Discrimination. The court had to decide whether independent contractors have the right to bring a cause of action for violations of their civil rights, even though the Act does not expressly grant them such a right. A 1982 regulation promulgated by the Commission interpreted the Law Against Discrimination to provide independent contractors with the general civil right to be free from discrimination because of race, creed, color, national origin, sex, handicap, and foreign boycotts.[173] This general civil right is enforceable through private civil action, the regulation stated, but not through the actions of the Human Rights Commission.[174] The court found that this interpretation was a valid exercise of the Commission's authority and was consistent with legislative purpose.[175] Thus, the court correctly gave it great weight in construing the Act.[176] As was recognized by the dissent in *Marquis*, the *Marquis* court's approach to judicial deference is wholly inconsistent with the approach followed by the court in *Griffin*.[177] The *Marquis* court's approach is correct, however, because it both preserves the authority of a necessary administrative agency and furthers the purpose of the Act.

1. *The Construction Is a Valid Exercise of the Commission's Delegated Authority*

The Washington Supreme Court found that the Law Against Discrimination is unambiguous to the extent that it sets forth a nonexclusive list of rights defining the general civil right to be free from discrimination, but that it is ambiguous in that it makes a broad statement of rights without defining the scope of those rights.[178] The Law Against Discrimination specifically declares that the general civil right to be free from discrimination includes, but is not limited to, the rights enumerated in the Act.[179] Thus, the court was correct in finding that the Law Against Discrimination's list of enumerated rights may

173. *See* Wash. Admin. Code § 162-16-170(2) (1995); *see also supra* note 140.

174. *See* Wash. Admin. Code § 162-16-170(2); *see also supra* note 140.

175. *See* Marquis v. City of Spokane, 130 Wash. 2d 97, 112, 922 P.2d 43, 51 (1996).

176. *See id.*

177. *See id.* at 127, 922 P.2d at 59 (Madsen, J., dissenting).

178. *See id.* at 107, 922 P.2d at 49.

179. *See* Wash. Rev. Code § 49.60.030(1) (1996). These rights include the right to obtain and hold employment, enjoy any place of public resort, accommodation, assemblage, or amusement, and engage in real estate, credit, and insurance transactions and in commerce free from discriminatory boycotts or blacklists. *See* § 49.60.030(1).

encompass other rights beyond those listed in the Act, such as the right to make personal contracts without being discriminated against on the basis of being a member of an already-protected class.

The Human Rights Commission's construction at issue in *Marquis* creates no new protected class. The creation of a protected right or class is not a valid exercise of the Commission's authority because an administrative agency may not amend or change a statute.[180] To bring a cause of action under this construction, independent contractors still must show, however, that they already are members of a protected class and not merely independent contractors.[181] Further, this construction does not grant a protected right that is not already available under the Law Against Discrimination, the right of any person to bring a cause of action for a civil rights violation.[182]

The construction at issue in *Marquis* is unlike those constructions that have been invalidated by the courts in the past. In *Fahn v. Cowlitz County*,[183] the Washington Supreme Court struck down the Human Rights Commission's construction of the Law Against Discrimination because it prohibited all pre-employment inquiries based on height and weight, regardless of whether the job applicant was a member of a protected class or not.[184] The court found that such a construction was an abuse of the Commission's delegated powers and authority, because it created a protected class consisting of all persons disadvantaged by the height and weight requirement.[185] In *Gugin v. Sonico, Inc.*[186] the court of appeals invalidated another construction promulgated by the Human Rights Commission because it prohibited discrimination against any person convicted of a crime, again regardless of whether he or she was a member of an already protected class.[187] In contrast, the Commission has created no protected class of persons discriminated against on the basis that they are independent contractors.

180. *See* Fahn v. Cowlitz County, 93 Wash. 2d 368, 383, 610 P.2d 857, 865 (1980); Gugin v. Sonico, Inc., 68 Wash. App. 826, 829, 846 P.2d 571, 573 (1993).

181. *See Marquis*, 130 Wash. 2d at 112, 922 P.2d at 51.

182. *See* Wash. Rev. Code § 49.60.020 (1996).

183. 93 Wash. 2d 368, 610 P.2d 857 (1980).

184. *See Fahn*, 93 Wash. 2d at 383–84, 610 P.2d at 865.

185. *See id.*

186. 68 Wash. App. 826, 846 P.2d 571 (1993).

187. *See id.* at 831, 846 P.2d at 574.

2. The Construction Is Consistent with Legislative Intent

An interpretation of the Law Against Discrimination granting independent contractors the right to bring a cause of action for violations of their civil rights is entirely consistent with legislative intent. Although the Law Against Discrimination does not expressly grant independent contractors the right to bring a cause of action, it clearly prohibits interpretations of the Act that would deny persons the right to protect their civil rights through private civil action.[188] Accordingly, the Commission's construction merely clarifies the Legislature's intent that all persons, including independent contractors, may protect their civil rights in court, and does not create any new protected right.[189]

The courts have upheld other constructions provided by the Human Rights Commission that have sought to clarify the intent of the Legislature. The Washington Supreme Court found that the Commission was justified in concluding that the Legislature did not intend to restrict "marital status" discrimination only to cases where an employer refuses to hire a person because that person is married or unmarried.[190] The Commission's definitions of what constitutes "age" and "handicap" for the purposes of the Act also have been deferred to and relied upon on various occasions by the courts.[191] The courts found in each of these cases that the Human Rights Commission acted well within its delegated powers and authority, even though its constructions went beyond what had been expressly provided for in the Law Against Discrimination. Similarly, a construction clarifying that independent contractors may bring a cause of action to protect their civil rights is well within the Commission's authority to interpret the Act.

188. *See* Wash. Rev. Code § 49.60.020 (1996).

189. *See supra* note 140 (quoting Wash. Admin. Code § 162-16-170(2) (1995)).

190. *See* Washington Water Power Co. v. Washington State Human Rights Comm'n, 91 Wash. 2d 62, 69, 586 P.2d 1149, 1153 (1978).

191. *See, e.g.*, Doe v. Boeing Co., 121 Wash. 2d 8, 846 P.2d 531 (1993); Phillips v. City of Seattle, 111 Wash. 2d 903, 766 P.2d 1099 (1989); Gross v. City of Lynnwood, 90 Wash. 2d 395, 583 P.2d 1197 (1978); Kimmel v. Crowley Maritime Corp., 23 Wash. App. 78, 596 P.2d 1069 (1979); Barnes v. Washington Natural Gas Co., 22 Wash. App. 576, 591 P.2d 461 (1979).

3. *The* Marquis *Court's Deference to the Commission's Construction Both Preserves the Interpretive Authority of the Commission and Furthers the Purposes of the Act*

By interpreting the Law Against Discrimination to grant independent contractors the ability to enforce their civil rights through private civil actions, the *Marquis* court recognized the crucial role the Human Rights Commission plays in administering and enforcing the Act. The Legislature clearly intended the Commission to address those discriminatory practices that could not have been anticipated by the Legislature but nevertheless came within the scope of the Act.[192] Thus, the Legislature granted the Commission broad discretion and responsibility to interpret legislative intent and administer the Act.[193] Further, the Human Rights Commission has been acting in this capacity for nearly fifty years and thus has acquired substantial administrative expertise, giving it a comparative interpretive advantage.[194] By giving great weight to the construction of the Law Against Discrimination at issue in *Marquis*, the court preserved the Commission's interpretive authority and insured the continued level of agency diligence and expertise necessary for the proper administration of the Act.

Deference to the Human Rights Commission's construction of the Law Against Discrimination at issue in *Marquis* also was proper because the construction furthers the intent of the Legislature. When interpreting ambiguous statutory provisions, courts should adopt the interpretation that best advances legislative intent.[195] The Commission expressly acknowledged that although discrimination against independent contractors is not an unfair practice, and thus not subject to its jurisdiction, independent contractors are still entitled to the protection of the general civil right to be free from discrimination.[196] The court agreed, and therefore correctly found that independent contractors must be allowed to bring a cause of action for violations of their civil rights. An interpretation that would deny independent contractors the right to sue, and thus the right to protect their civil rights at all, would be

192. *See Washington Water Power Co.*, 91 Wash. 2d at 69, 586 P.2d at 1153.

193. *See Barnes*, 22 Wash. App. at 581, 591 P.2d at 464.

194. *See* Asimow, *supra* note 29, at 1204 ("A court may be limited to conventional tools of statutory interpretation, such as the use of dictionaries or ancient canons of construction, but an agency may be more competent to reach an interpretation that reflects legislative intent, furthers the statutory policy, and facilitates enforcement and administration."); *see also* Diver, *supra* note 170, at 578, 589.

195. *See* Hart v. Peoples Nat'l Bank, 91 Wash. 2d 197, 203, 888 P.2d 204, 208 (1978).

196. *See* text of Wash. Admin. Code § 162-16-170(2) (1995), *supra* note 140.

contrary to legislative intent. Thus, by adopting the Human Rights Commission's construction of the Act, the court chose the interpretation that best fulfilled legislative intent.

C. *Improper Application of the Established Rules of Judicial Deference Leads to Undesirable Results*

Unlike the approach followed by the court in *Marquis*, the *Griffin* court's approach to judicial deference illustrates the problems that arise when courts fail to apply properly the established rules of judicial deference. One such problem is that an agency's authority to engage in statutory interpretation, and thus its ability to administer effectively the statute for which it is responsible, is diminished. This is particularly true when the Legislature has established a broad remedial statute and has created an agency with wide discretion and responsibility to administer that statute. The purpose of the rules of judicial deference is to preserve both the ability of administrative agencies to construe ambiguous statutory language, and thus their ability to implement that language, and the authority of the courts to determine what the law is.[197] This delicate balance of interpretive authority is threatened, however, every time the courts, as happened in *Griffin*, fail to apply these rules properly.

Improper application of the established rules of judicial deference also results in incorrect and inconsistent interpretations. Because an agency often has a comparative interpretive advantage, courts may adopt absurd, unlikely, or strained interpretations if they do not give proper deference to the agency's construction. Such interpretations in general both contradict the intent of the Legislature and frustrate the purpose of the statute being interpreted. In addition, proper application of the established rules of judicial deference encourages more consistent interpretations. These rules, as with all rules of statutory interpretation, are necessary to insure that the courts apply the law evenly and that judicial discretion does not go unconstrained. Likewise, because the courts still possess the ultimate authority to determine what the law is, they can prevent administrative agencies from abusing their delegated interpretive powers.

197. *See* Asimow, *supra* note 29, at 1159.

V. CONCLUSION

The Washington Supreme Court has set a dangerous precedent for future judicial review of administrative constructions of the Law Against Discrimination by failing to apply consistently the established rules of judicial deference. By focusing exclusively on the issue of contemporaneity, the court in *Griffin* failed to acknowledge the Human Rights Commission's broad delegation of rule-making and policy-formulation powers and its expertise in administering the Act. The *Griffin* court thus not only compromised the interpretive authority of the Commission, but also misinterpreted the Act to deny persons working for small employers any means with which to enforce their civil rights. The court instead should continue to apply the established rules of judicial deference, and it should decline to give substantial deference to the Commission only when the Commission has clearly changed or amended the meaning of the Law Against Discrimination beyond what the Legislature has intended.